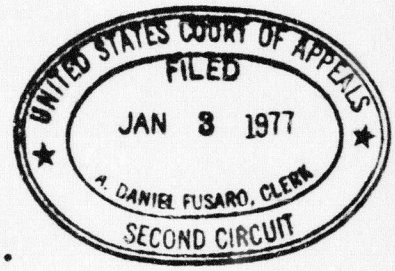
United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL APPENDIX

76-7340



IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

EDMOND PFOTZER AND E. JOHN PFOTZER, ETC.

Plaintiffs - Appellants,

v.

AMERCOAT CORPORATION AND AMERON, INC.

Defendants - Appellees

B P/s

U.S. DISTRICT COURT, DISTRICT OF CONNECTICUT
Civil No. B-947

U.S. CIRCUIT COURT OF APPEALS, SECOND CIRCUIT
Docket NO. 76-7340

ON APPEAL FROM U.S.D.C. CONNECTICUT
RULING DENYING PLAINTIFFS' MOTION
TO SET ASIDE STIPULATION OF DISMISSAL

Sat below: NEWMAN, D.J.

SUPPLEMENTAL LEGAL CITATIONS[1]

Edmond Pfotzer and E. John Pfotzer
Appellants pro se
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Tel: (302) 571-0595

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[1] Submittal authorized by Circuit Court at hearing on 12-28-76.

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SUPPLEMENTAL LEGAL CITATIONS

STATEMENT

Appellants submit for the Court's consideration, in further support of their "Brief, Reply Brief, and Oral Argument" the following citations as specifically relate to the application of the pertinent scope of Rule 60(b) of the Federal Rules of Civil Procedure, and as set out under the following sub-divisions.

POINT I:

APPELLANTS CONTEND THE RECORD SHOWS DEFENDANTS' SEVERAL ATTORNEYS HAVE COMMITTED A FRAUD ON THE SEVERAL INVOLVED COURTS, AND ON THE APPELLANTS, AND WHICH FRAUD HAS RESULTED IN THE OBSTRUCTION OF JUSTICE, IN THAT THE APPELLANTS WERE THEREBY DENIED A HEARING ON THE MERITS OF THEIR SEVERAL INVOLVED ACTIONS.

Defendants' attorneys planned from the outset, to breach the several stipulations (contracts), and which plan was progressively executed, and put to fraudulent use in the Court below, and from thereon the trail of the said attorneys' fraud continued without break, and as culminating with defendants' attack on the basic stipulation in the Superior

Court (Docket 14326) to the effect that it was an invalid stipulation. Such attorneys' fraud has heretofore been considered in:

1. KUPFERMAN v. CONSOLIDATED RESEARCH & MFG. CORP.
459 F 2d 1072 (1972 - 2d Cir.)

(p. 1073) - An attorney's loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court, and, when he departs from that standard, he perpetrates a "fraud upon the court" within savings clause of rule governing relief from judgment or order. Fed. Rules Civ. Proc. Rule 60(b) (1,3), 28 U.S.C.A.

(p. 1078) - While an attorney should represent his client with singular loyalty that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the court.

2. ARMOUR AND COMPANY v. NARD
56 F.R.D. 610 (1972 - U.S.D.C.)

(p. 611) - 4. "Fraud on the Court" within rule pertaining to relief from judgment is fraud which defiles the court itself, or is fraud which is perpetrated by officers of the court in such manner that the judicial machinery cannot proceed in the regular manner to adjudicate cases. Fed. Rules Civ. Proc. Rule 60(b), (3,6), 28 U.S.C.A.

(p. 611) - 6. Within rule pertaining to relief from judgment, fraud is "extrinsic" when a party is prevented from fairly presenting his claim, his defense or his evidence by reason of a trick, artifice or other fraudulent conduct; Fed. Rules Civ. Proc. Rule 60(b), (3,6), 28 U.S.C.A.

3. HAZEL-ATLAS GLASS CO. v. HARTFORD-EMPIRE CO.
322 US-238-271 (1943 Oct. Term)

(p. 244) - From the beginning there has existed alongside the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry. Marine Ins. Co. v. Hodgson, 7 Cranch (US) 322, 3 L Ed 362.

(p. 248) - Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations.

(p. 250) - The total effect of all this fraud, calls

for nothing less than a complete denial of relief to Hartford for the claimed infringement of the patent thereby procured and enforced.

Since the judgments of 1932 therefore must be vacated, the case now stands in the same position as though Hartford's corruption had been exposed at the original trial. In this situation, the doctrine of the Keystone Driller Co. case, supra, requires that Hartford be denied relief.

4. ROOT REFINING CO. v. UNIVERSAL OIL PRODUCTS CO.
169 F 2d 514 (1948-CA-3d Cir.)

(p. 518) - As quoting from the Supreme Court in 328 US page 580: "The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question. Hazel-Atlas Co. v. Hartford-Empire Co., 322 US 238, 64 S.Ct. 997, 88 L. Ed. 1250. The power to unearth such a fraud is the power to unearth it effectively. Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation. But if the rights of parties are to be adjudicated in such an investigation, the usual safeguards of adversary proceedings must be observed. No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings could justly be

assessed against the guilty parties. Such is precisely a situation where 'for dominating reasons of justice' a court may assess counsel fees as part of the taxable costs. Sprague v. Toconic National Bank, 307 US 161, 167, 59 S. Ct. 777, 780, 83 L. Ed. 1184.

(p. 523) - In Hazel v. Hartford 322 US 1002 - The Supreme Court stated: "Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations."

(p. 534) 8. Equity. No principle is better settled than the maxim that he who comes into equity must come with clean hands and keep them clean throughout the course of the litigation and that if he violates this rule he must be denied all relief whatever may have been the merits of his claim. Hazel-Atlas Co. v. Hartford Co., 322 US 238.

5. DAUSUEL ET AL. v. DAUSUEL
195 F 2d 775 (1951-CA Dist. of Columbia)

(p. 775) - A court may at any time set aside a judgment for after-discovered fraud upon the court. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 US 238, 244, 64 S. Ct. 997, 88 L. Ed. 1250. Rule 60(b), Fed. Rules Civ. Proc, 28 U.S.C.A., expressly "does not limit" the power of a court to entertain an action for that purpose.

6. HADDEN v. RUMSEY PRODUCTS ET AL.
196 F 2d 92 (1952-CA 2d Cir.)

(p. 95) - Rule 60(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., provides that on motion and upon such terms as are just, the court may relieve a party from a final judgment for fraud, misrepresentation or other misconduct of an adverse party.

POINT II

JUDGMENTS OR ORDERS OF A COURT SHOULD BE VACATED WHERE THE CONSIDERATION FOR THE STIPULATION AGREEMENT HAS FAILED ON WHICH THE COURT'S ORDER WAS PREDICATED ETC.

Appellants submit that defendants' consideration for the November 11, 1974 "Stipulation Of Dismissal-With Prejudice" entered in the United States District Court for the State of Connecticut should be vacated, in that the consideration for that stipulation (contract) has failed, and as in consideration of the defendants' fraud in withdrawing their primary action against these appellants (Pfotzers) over Pfotzers' objection and exception. Said defendants' withdrawal of their primary action on December 3, 1975, constitutes prima facie evidence of the merits of Pfotzers' derivative actions against said defendants (see Exhibit A appellants' brief and pp. 76a and 77a). The authority for the vacating of prior judgments etc., under analogous circumstances, is hereinafter set out.

1. KELLY v. GREER
334 F 2d 434 (1964-CA-3d Cir.)

(p. 435) - 3. Orders dismissing actions with prejudice would be vacated after defendant refused to carry out terms of settlement agreement which was basis of dismissal of actions within district as well as other civil actions,

actions within district would be in status quo, existing immediately following reading of settlement agreement into record, nonresident defendant would be required to return removed property which was in dispute and which was basis of jurisdiction and Federal District Court could then proceed to determine whether non resident defendant in agreeing to settlement plan had submitted to jurisdiction over her person. 28 U.S.C.A. §§ 1655.

(p. 436) (1,2) - Of course the District Court has jurisdiction to vacate its own orders of dismissal which were based upon the stipulation of the parties in reliance upon their settlement agreement. Rule 60(b), Fed. Rules Civ. Proc. However, the District Court appears to have been of the view that the dismissal of the original actions with prejudice deprived it of jurisdiction to entertain the ancillary complaints seeking enforcement of the settlement agreement. But there can be no question of the power of a federal district court to vacate its own orders entered in civil actions over which it had original jurisdiction "whenever such action is appropriate to accomplish justice".

2. BROS INC. v. W.E.GRACE MFG. CO.
320 F 2d 594 (1963-CA-5th Cir.)

(p. 606) - (18) A motion for equitable relief from judgment or order is a direct attack on the judgment. Fed.

Rules Civ. Proc. Rule 60(b), 28 U.S.C.A.

(p. 606) - (20) A court exercising equitable jurisdiction can properly grant relief from any kind of judgment and against judgment of any court.

(p. 608) - (23) By virtue of rule provision it is not necessary to formally institute independent equitable proceeding for relief from judgment if relief can be granted under rule. Fed. Rules Civ. Proc. Rule 60(b), 28 U.S.C.A.

(p. 608) - (24) "Any other reason" subsection of rule provision for relief from judgment or order means to make available those grounds which equity long recognized as basis for relief. Fed. Rules Civ. Proc. Rule 60(b), 28 U.S.C.A.

POINT III

IT IS NO LONGER EQUITABLE THAT THE SUBJECT ORDER OF THE LOWER COURT SHOULD HAVE PROSPECTIVE APPLICATION OF ANY CHARACTER INCLUDING DEFENDANTS' CLAIMS OF RES JUDICATA

Appellants contend that because of defendants' combined fraud on the court, and on these appellants, and the failure of defendants' consideration for the "Stipulation of Dismissal", it is no longer equitable that the court's order of dismissal dated November 13, 1975, p. 29a, should have any prospective application, including its use for the support of any defendants' potential claim of res judicata as related thereto.

The fraud on the court and the appellants, asserted next above, not only includes the references to the fraud of defendants' attorney in the subject Civil Action B-947, and as briefly alluded to by him, commencing with line 22 on p. 116a, and as further detailed at the oral hearing before the court on December 28, 1976; but also includes the correlated, related conspiracy and fraud of defendants' attorney in Civil Action 14326 in the Superior Court of the State of Connecticut, and the latter as is set out under paragraph 8, on pages 12 to 14 inclusive of appellants' "Brief", including the additive of said attorney's pertinent perjury as set out on pages 9 and 10 of appellants' "Brief".

Appellants' legal support for the above contentions are hereinafter set out.

1. CHARLES PFIZER & CO. v. DAVIS-EDWARDS PHARMACAL CORP. 385 F 2d 533 (1967-CA-2d Cir.)

(p. 537) - Appellant's second point is based upon Fed. Rules Civ. Proc. Rule 60(b)(5), which provides that a court may relieve a party from a final judgment if "it is no longer equitable that the judgment should have prospective application".

(p. 538) - Therefore, we take pains to point out that our decision here is without prejudice to another application to the District Court for relief under Fed. Rules Civ. Proc. 60(b)(5) or(6) based upon new or further documented reasons why it would no longer be "equitable that the (1965) judgment should have prospective application" or "relief from the operation of the judgment" would be justified.

2. UNITED STATES OF AMERICA v. CATO BROTHERS INC. ET AL. 273 F 2d 153 (1959 - 4th Cir.)

(p. 157) - In general, relief from judgments has been given under subsection (6) in cases where the judgment was obtained by the improper conduct of the party in whose favor it was rendered....under circumstances not covered by subsections (1) to (5) which, in the opinion of the court, required the application of subsection (6) in order that the case be tried on its merits and justice be done.

POINT IV

RELIEF SOUGHT, THAT TO BE GRANTED, OR WITHIN POWER OF COURT TO GRANT SHOULD BE DETERMINED BY SUBSTANCE NOT BY LABEL - FEDERAL RULES CIVIL PROCEDURE - RULE 1 USCA

Appellants submit that their subject motion to vacate the stipulation of November 11, 1974 as denied by the court below, on May 12, 1976, p. 9a, should have been granted in accord with the application of the legal principles set out under:

1. BROS INC. v. W.E. GRACE MFG. CO.
   320 F 2d 594 (1963-CA 5th Cir.)

   (p. 606) - (16) Relief sought, that to be granted, or within power of court to grant, should be determined by substance, not by label. Fed. Rules Civ. Proc. Rule 1, USCA.

2. HADDEN v. RAMSEY PROD. ET AL.
   196 F 2d 92 (1952-CA 2d Cir.)

   (p. 93) 2. Under rule providing that federal rules of civil procedure shall be construed to secure just, speedy and inexpensive determination of every action, petition of judgment debtors for show cause order could be treated as independent action to obtain equitable relief notwithstanding rule stating that action is commenced by filing a complaint, and petitioners would not be bound by labels placed on the papers. Fed. Rules Civ. Proc. Rules 1,3,60(b), 28 USCA.

(p. 95) Although Rule 3 states that an action is commenced by filing a complaint it would be quite out of harmony with the spirit of Rule 1 to hold the appellees bound by the labels placed on the papers submitted to the District Court.

CONCLUSION

APPELLANTS SUBMIT THAT IN CONSIDERATION OF THE APPLICABLE TOTALITY OF THE AFOREMENTIONED LEGAL CITATIONS AND QUOTED EXCERPTS THEREFROM THAT:

"Full scope can be given to subsection (6) of Rule 60(b) by applying it in a liberal spirit in accordance with the principle of ejusdem generis to situations in the same general class as those enumerated in the five preceding subsections. This was done in Klapprott v. United States, 335 U.S. 601, 69 S. Ct. 384, 93 L. Ed. 266, where a default judgment....was vacated under the power given to the court in subsection (6) of Rule 60(b), although he had not filed his motion to vacate the judgment within the time prescribed by the rule in cases of excusable neglect." - (p. 157) United States v. Cato Bros, Inc., 273 F 2d 153 (1959 CA-4th Cir.)

Respectfully Submitted,

E. Pfotzer

Edmond Pfotzer - pro se

E. John Pfotzer

E. John Pfotzer - pro se

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 1976, I forwarded by U.S. certified mail - return receipt requested - postage prepaid - two copies of appellants-plaintiffs' foregoing "Supplemental Legal Citations" to: appellees-defendants' (Amercoat-Corporation and Ameron, Inc.) counsel, Kevin J. Maher, Esq., Maher & Maher, 955 Main Streetm Bridgeport, Connecticut, 06601.

E. John Pfotzer

E. John Pfotzer - pro se